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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARC JAY CASH,

Defendant and Appellant.

D055335

(Super. Ct. No. SCN217421)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Affirmed.

A jury convicted Marc Jay Cash of eight felony counts, including committing a lewd act upon a child under the age of 14 (counts 1-5); distributing harmful matter with the intent to seduce a minor (count 6); possessing a deadly weapon (count 7); and resisting an officer (count 8). It also found true the allegation that counts 1, 2, 4 and 5 involved substantial sexual conduct with the minor. The court found true the allegation that Cash was released on bail at the time he committed counts 1 and 7. The court sentenced Cash to the middle term

of six years in count 1, concurrent six-year sentences in counts 2 through 5, concurrent two-year sentences in counts 6 and 7, and time served in count 8.

On appeal, Cash challenges several evidentiary rulings, asserts the court erred in instructing the jury, and argues there is insufficient evidence to prove he showed "harmful matter" to the minor victim within the meaning of Penal Code sections 288.2, subdivision (a), and 313, subdivision (a). (Undesignated statutory references are to the Penal Code.) He also contends he is entitled to reversal based on cumulative error. We conclude there was no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Nicole, the victim, was nine-years old and in the fourth grade at the time of trial in the fall of 2007. Her parents, whom we refer to as Father and Mother, separated in October 2000 and finalized their divorce in November 2001. In early 2001, Mother moved into Cash's residence in the same San Marcos mobilehome park where the family had lived before Father and Mother separated. Mother married Cash sometime before trial.

Father and Mother shared custody of Nicole and her 14-year-old brother, with Father's home in Warner Springs declared the primary residence. When Nicole was in second grade, the children lived with Father during the school week and with Mother on weekends. The schedule shifted in the summer months so that the children spent more time with Mother.

Father noticed a change in Nicole's behavior in the summer of 2006. She cried for no reason, argued with her brother, and stalled when getting ready to leave for Mother's house. On August 16, 2006, Father took the children swimming before driving them to Mother's later in the afternoon. When Nicole refused to play with her brother, he threatened to tell

something to Father. Nicole said she wanted to tell Father herself. After some discussion, both children wrote notes to Father. Nicole sealed her note in an envelope and asked Father not to read it until after he dropped them off at Mother's house.

When they arrived at the home Mother shared with Cash, Nicole told Father she did not want to stay. Father explained that it was her time to be with Mother. Nicole went inside and Father left.

Once home, Father looked at Nicole's note, which read: "I – I sucked mark Dick last week sorry I won't do it again. Love daddy." He also read his son's note, which stated that Nicole told him and their stepbrother that Cash "lets her suck his dick and hump him." Father called law enforcement. San Diego County Sheriff's Deputy Terry Phillips removed the children from Cash's home later that night. When Deputy Phillips asked Nicole if she had written a letter to Father, she responded: "Yes, I did. I won't do it again. I'm sorry."

At trial, Nicole testified that Cash showed her "nasty movies" on his laptop computer on at least 10 occasions since she was in the first grade. The most recent incident occurred during the summer before the police came to Cash's house. He showed her the movies when Mother was somewhere else and her brother and stepbrother were outside playing. Nicole also testified that Cash touched her vagina with his hand twice and touched her vagina with his penis twice. On one occasion, Cash forced her to sit on him so that their "privates" were touching and move her body the way people did in the "nasty movies." Nicole stated that during the second grade and the summer that followed, she put her mouth on Cash's penis at least five times. Cash promised to allow her to drive the car around the mobilehome park if she "suck[ed his] dick."

Cash told Nicole not to tell anyone what happened. On one occasion, Cash said he was going to tie her up and make her "suck his dick." Nicole told Mother about what Cash said, and Mother responded that Cash would "never do that." After that, Nicole did not talk to Mother about the touching because she felt Mother would not believe her. She told Father instead.

During interviews with the child abuse unit, Nicole told the investigators that Cash had three computers: one desktop and two laptops. She described seeing a gray computer in the living room. Nicole said she watched the "dirty movies" in the living room.

Based on this information, Detective Reden joined a dozen deputies in the execution of a search warrant at Cash's residence on September 5, 2006. Cash ran when the deputies approached. When Cash refused to comply with orders to stop, raise his hands and get on the ground, the deputies subdued and handcuffed him.

The deputies found a desktop computer in the main living area, a Dell laptop in a closet in Cash's bedroom, and a Compaq laptop under the dresser next to Cash's bed. They discovered a set of brass knuckles inside the dresser. Detective Reden found a collection of photographs in Cash's bedroom: (1) five photographs of Cash in the nude, including two in which Cash posed with different women clad only in high heel shoes; (2) a photograph of a nude woman lying on the floor with her legs spread apart; and (3) a photograph depicting a woman orally copulating the vaginal and anal area of another person. Detective Reden also found two DVD's (digital versatile disks) in Cash's bedroom, one representing commercially produced adult pornography entitled "Love Below."

Analysis of the Compaq laptop by the Regional Computer Forensic Lab (RCFL) revealed 34,000 "questionable" images, described at trial as erotica focused on genitalia that might be considered pornography. The bulk of the images were child erotica taken of young female subjects in suggestive poses. Some of the images depicted children's genitalia or sex acts involving children. Working with a duplicate hard drive from the Compaq laptop, Detective Reden bookmarked a sampling of 200 images for further analysis.

The RCFL computer specialist Victoria Homfeld analyzed the Compaq laptop for dominion and control and registry information. She found no names associated with the laptop. The registered owner of the Compaq laptop and Windows XP operating system was entered as "900." The default user was designated as "300." Homfeld testified that all 200 images bookmarked by Detective Reden were associated with the user known as "300." She determined that user "300" logged on to the laptop for the last time at 3:02 a.m. on August 21, 2006, and shut down the laptop for the last time seven hours later.

In July 2007, almost a year after Nicole and her brother were removed from Cash's home, Nicole spent the day at the home of her friend's grandmother, Sue Decker. A woman who identified herself as Mother telephoned Nicole while she was there. Decker observed that Nicole was very nervous when she took the telephone and became visibly upset while talking with Mother. Decker heard Nicole repeatedly say that she was not lying. When Nicole hung up the telephone, Decker, who knew none of the specifics about the case, tried to calm her and asked what was wrong. Nicole kept repeating that she was telling the truth.

When Mother called back a few minutes later, Decker picked up an extension to listen to the conversation. While Nicole continued to talk with Mother, she began shaking and

crying again. Decker heard Mother say that she missed Nicole, loved her very much, and could not wait to see her when she, her children and Cash could live together again. She just needed Nicole to say that Cash did not "say those things to her." Nicole insisted that he did and she was not lying. Mother kept demanding that Nicole recant. Nicole became hysterical and replied, "He did. He did and I swear I'm not lying and I don't want to be with him. I don't want to be with you guys." Mother told Nicole she bought her a present which she could hug all night long if she would say that Cash did not do anything to her. Decker testified that Nicole repeatedly asked her mother if they could talk about something else. Mother continued to demand, "Tell me." Nicole finally said, "Okay. Fine. Fine. He didn't. He didn't say anything. He didn't do anything . . . ," and hung up the telephone.

Cash testified at trial and denied the allegations against him. He admitted posing for the nude pictures of himself and possessing the two DVD's of adult pornography, but stated he never watched them.

Nicole's credibility was an issue at trial. Cross-examination by the defense revealed that she had reported incidents involving other men. On a camping trip to Lake Henshaw, Nicole told Father that another camper named David had solicited her to have sex with him. She also reported to a "lady" who interviewed her concerning Cash that a man named Bubba touched her private parts over her clothes while she was living at Mother's house. Nicole also said she had seen Bubba naked. She told her parents what had happened. Nicole's stepbrother, an eighth grader, testified for the defense that Nicole never told him that Cash was molesting her.

DISCUSSION

I. *Evidentiary Rulings*

Cash argues the court abused its discretion in admitting (1) the lewd photographs and DVD's found in Cash's bedroom (court's exhibit 2/People's exhibits 19-26); (2) the 200 images found on the Compaq laptop (court's exhibit 1); and (3) Decker's testimony about the telephone conversation between Nicole and Mother. He also contends that the error resulted in a fundamentally unfair trial in violation of his due process rights. We reject these arguments.

Evidence Code section 350 states that only relevant evidence is admissible.

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*), citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

The trial court has discretion to exclude relevant evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'

[Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" (*People v.*

Zapien (1993) 4 Cal.4th 929, 958 (*Zapien*).) The undue prejudice justifying exclusion under Evidence Code section 352 "'applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638 (*Karis*).)

The trial court has broad discretion to admit or exclude evidence under Evidence Code section 352, and we will not overturn its ruling absent an abuse of discretion. (*Falsetta, supra*, 21 Cal.4th at pp. 917-918.) Moreover, "[w]e do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.'" (Evid. Code, § 353, subd. (b); see also . . . *People v. Watson* (1956) 46 Cal. 2d 818, 836 [(*Watson*)] . . . [error is harmless under our state constitutional standard unless it is 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error'].") (*People v. Earp* (1999) 20 Cal.4th 826, 878 (*Earp*).) On this record, we conclude the court did not abuse its discretion in admitting the challenged evidence.

A. Photographs and DVD's Consisting of Adult Pornography

The prosecution moved in limine to admit court's exhibit 2 consisting of the photographs and two DVD's found in Cash's bedroom. It argued that the photographs demonstrated motive because they showed that Cash was "visually sexually aroused." The prosecution also maintained that the photographs refuted the anticipated defense that the Compaq laptop containing child pornography did not belong to Cash. In response to the defense argument that the photographs were also irrelevant because they were 10 to 15 years

old, the prosecution asserted that they were relevant to the anticipated defense that Cash never showed Nicole any pornography and the question of Nicole's credibility. The court excluded court's exhibit 2 under Evidence Code section 352 based on the age of the photographs, but without prejudice to the prosecution raising the issue later based on the evidence.

During a break in trial, defense counsel confirmed Cash would argue that the Compaq laptop did not belong to him. The court indicated it would revisit the in limine ruling regarding court's exhibit 2 if the defense claimed that Cash had no idea there was pornography in the house. Defense counsel acknowledged that there was adult pornography in the house but argued, "That's different than *child* porn." (Italics added.) The court stated: "Differentiating between different types of porn is not something I'm going to engage in this courtroom. To me porn is porn." The court considered the "adult porn" circumstantial evidence that Cash knew about the child pornography.

Over defense objection, the court ruled the photographs in court's exhibit 2 were admissible, but asked the prosecutor to cover Cash's genitals with tape. Shifting emphasis regarding relevance, defense counsel argued there was "no relationship between looking at adult pornography and child molest," the charges facing Cash. However, under Evidence Code section 352, the court found that the probative value of the photographs outweighed their prejudicial effect because the jurors had already seen a "great deal of porn." It also found there was no undue consumption of time because the photographs were found in the same search that led to discovery of the Compaq laptop. The court also stated, "I'm not going to let the jury think that he's got this porn on his computer and this is a strange

phenomenon that occurred in his home when it exists in other places." The photographs were later admitted as exhibits 19 through 25. The court also admitted the two DVD's containing adult pornography as exhibit 26 over defense objection on grounds of prejudice and lack of foundation and relevance.

On appeal, Cash contends "[t]he trial court erred by admitting the photographs because they were remote, not relevant to any issues in dispute, and prejudicial." As to relevance, he maintains the fact a person is aroused by viewing adult pornography does not mean the person would be aroused by child pornography. As to the DVD's, he argues without citation to evidence or other authority that: "Many adults possess adult pornography. Very few of them molest children." Cash also contends admission of the photographs denied him a fair trial in violation of the federal Constitution. We reject his arguments.

We have no doubt the defense would have preferred the jury not see the DVD's and nude photographs of the defendant and adult women described as adult pornography. However, as we explained, the fact that evidence may be damaging to a defendant's case does not mean it is inadmissible under Evidence Code section 352. (*Zapfen, supra*, 4 Cal.4th at p. 958.) Here, the court properly concluded that any prejudice was outweighed by the probative value of exhibits 19 through 26 on two disputed issues: (1) whether the Compaq laptop belonged to Cash; and (2) Nicole's credibility in claiming Cash showed her "nasty movies" on the laptop computer.

As to relevance, the photographs and DVD's were circumstantial evidence that Cash had knowledge of and possessed other types of pornography in the face of denials that he

ever watched the DVD's or downloaded or viewed child pornography on the laptop. The evidence also bolstered Nicole's claims and was therefore probative of Cash's guilt of showing her harmful matter as alleged in count 6.

The prejudice arising from admission of the seven photographs and two DVD's was minimal compared with other evidence and not of the type that "'uniquely tends to evoke an emotional bias against the defendant as an individual.'" (*Karis, supra*, 46 Cal.3d at p. 638.) Nicole had already testified in detail about the ways Cash had touched her vagina with his hand and penis, and made her orally copulate him. In addition, the visual impact of the photographs and DVD's was far less than that of the 200 bookmarked images already admitted as court's exhibit 1 and provided in notebook form to the jurors. Accordingly, we conclude the court did not abuse its discretion in ruling that the probative value of the evidence outweighed its prejudicial effect and therefore find no violation of his constitutional rights.

In any event, even if we were to conclude the court erred in admitting the photographs and DVD's, which we do not, on this record it is not reasonably probable that Cash would have obtained a more favorable result had the evidence been excluded. (*Earp, supra*, 20 Cal.4th at p. 878, citing *Watson, supra*, 46 Cal.2d at p. 836.)

We comment briefly on two additional issues. On appeal, Cash relies on the Ninth Circuit opinion in *People of Territory of Guam v. Shymanovitz* (9th Cir. 1998) 157 F.3d 1154, which held that sexually explicit gay adult magazines and fictional articles describing sexual conduct between a father and son and a priest and young boy were inadmissible to show defendant's intent to sexually molest young boys. (*Id.* at pp. 1155, 1158-1159.) Cash's

reliance on *Shymanovitz* is misplaced for several reasons. First, lower federal court decisions are not binding on California courts, even on federal questions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Second, the Ninth Circuit, sitting en banc, overruled *Shymanovitz* in *United States v. Curtin* (9th Cir. 2007) 489 F.3d 935, 953-956, holding that material subject to First Amendment protections was not automatically excluded under federal rules of evidence. (*United States v. Curtin* (9th Cir. 2009) 588 F.3d 993, 996.) Third, in this case the prosecution offered the photographs and DVD's to counter attacks on Nicole's credibility and the defense that the Compaq laptop along with its 34,000 questionable images did not belong to Cash. Exhibits 19 through 26 were not offered to establish Cash's intent to molest Nicole.

B. Pornographic Images on the Compaq Computer

The prosecution also sought admission of court's exhibit 1, a notebook containing the 200 images bookmarked and extracted from the Compaq laptop. It noted that the defense wanted to convince the jury that Cash was not interested in little girls and argued that the images were valuable circumstantial evidence of his true interests. The first section of the notebook showed "tiny" images in black and white with information from RCFL as to when each was created, where it was created, where it was downloaded from, and where it was found on the laptop computer. The second section provided larger color copies of the same 200 images. The prosecutor explained that most of the images had been downloaded to the laptop on August 5, 2006, and August 6, 2006, and the last download occurred on August 11, 2006.

The defense acknowledged the potential relevance of the images from the laptop, but argued that due to their highly prejudicial impact, the prosecution had to provide a nexus other than the fact the computer was found in the house where Cash lived. The court decided to hear testimony from Detective Reden and RCFL's analyst Homfeld on whether there was anything linking Cash with the laptop.

After reviewing the images and considering the arguments of counsel, the court found court's exhibit 1 relevant to intent and motive in counts 1 through 6. The court acknowledged that "nobody is going to look at these photographs . . . and not feel some emotion," but found that they would not mislead the jury. The court heard testimony from RCFL analyst Homfeld and Detective Reden the following day and found the prosecution had established Cash's dominion and control over the computer. Based on this fact and the earlier Evidence Code section 352 analysis, the court ruled that the 200 images were admissible.

On appeal, Cash argues that the court abused its discretion in admitting the 200 images because: (1) the prejudice outweighed their probative value; (2) the ruling deprived him of a fair trial and due process of law; and (3) there was insufficient evidence to connect the images to Cash. He maintains that the inflammatory images created a side issue so that "[t]he jury's main focus was on the 200 photographs rather than assessing the credibility of Nicole and [Cash]." Again, we conclude there was no abuse of discretion and no violation of Cash's constitutional rights.

In *People v. Memro* (1995) 11 Cal.4th 786 (*Memro*), the California Supreme Court held that "sexually explicit stories, photographs and drawings of males ranging in age from

prepubescent to young adult" were admissible to show the defendant's intent to sexually molest a young boy. (*Id.* at p. 864.) It ruled that "the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Id.* at p. 865.)

The same is true in the case before us. Cash placed his intent at issue by pleading not guilty to the crimes charged. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) The 200 images included in court's exhibit 1 were probative of intent in counts 1 through 6. As described by the court, "[t]he photos either depict a female engaged in the act of intercourse or oral copulation, females that are very young and scantily dressed and/or full-on pre-pubescent females who are naked. [¶] The adult females in these photographs . . . give[] one the impression that they're imitating a young female." As in *Memro, supra*, 11 Cal.4th at pages 864-865, the jury could infer from the images that Cash was attracted to young girls of Nicole's age and intended to act on that attraction. The photos were also probative of Nicole's credibility in claiming that Cash showed her "nasty movies" as alleged in count 6. The existence of the images on the laptop was also probative of Cash's credibility in light of his testimony that he never looked at child pornography on his laptop, never visited a child pornography website, and never downloaded child pornography to any of his computers.

Cash argues that this case is distinguishable from *Memro* because there was insufficient evidence to connect him with the 200 computer images, the foundation required to permit admission of that evidence. (Evid. Code, § 403, subd. (a); *People v. Lucas* (1995) 12 Cal.4th 415, 466.) There is no merit in this argument. Detective Reden testified at the Evidence Code section 403 hearing that she became aware of the laptop during the search of

his residence. Cash directed the officers to all three computers, including the Compaq laptop under the dresser in his bedroom. He never indicated to Detective Reden that the laptop was not his. RCFL analyst Homfeld testified that she extracted the 200 images in court's exhibit 1 from the Compaq laptop after Detective Reden bookmarked them. Homfeld also testified that although the registered owner of the laptop was entered as "900" and the default user as "300," she found a few items when she searched for the names "M-A-R-C" and "C-A-S-H." These included a page file of "teensforcashurl." This evidence provided the necessary link between Cash and the 200 images found on the Compaq laptop.

Cash contends the prejudicial impact of the 200 images outweighed their limited probative value. He maintains admission of the photographs "inevitably resulted in the jury judging [him] a child molester . . . based on the extraneous factor of these photographs." The images were damaging to Cash's case precisely because they were highly probative, *not* because they "'uniquely tend[ed] to evoke an emotional bias against the defendant as an individual'" with "'very little effect on the issues.'" (*Karis, supra*, 46 Cal.3d at p. 638.) Although the images of the young girls might have been disturbing to members of the jury, the evidence was less damaging than Nicole's graphic description of the ways Cash molested her. Moreover, there was no undue consumption of time because the prosecution used only two witnesses to establish the foundation for admission of the images.

C. Nicole's Telephone Conversation with Her Mother

The prosecution moved in limine to admit Sue Decker's testimony recounting Nicole's telephone conversation with Mother as a prior consistent statement by a minor victim under Evidence Code section 1360. It argued at the hearing: "I think that exchange is so probative

and relevant to this case and to the [credibility] attack that's going to be made on her, that even under these conditions, this kid who has literally not seen her mother in over a year, the pressure on this kid to change her tune is unbelievable. [¶] And the fact that she continues not to do it even under these conditions where there's no judge watching her, there's no jury watching her, she's not being videotaped for the purposes of anything, she's just a sad little girl who's confused and yet she continues to tell the truth." Defense counsel countered that the prosecution's real purpose in offering evidence of the telephone conversation was to raise the side issue of Mother's contact with Nicole in violation of court orders in both the criminal and family law cases.

The court denied the prosecution motion, ruling it inadmissible under Evidence Code sections 1360, 1240 and 352. The court indicated it would be willing to reconsider if the defense asked Nicole whether she was lying as a result of the custody dispute between her parents. Later, during Nicole's testimony, the court decided that Decker's testimony about the telephone conversation with Mother would be admissible, with the appropriate foundation, as a spontaneous statement to "impeach[] the defense theory that the whole impetus of Nicole's statements [was] due to the child custody battle in which her father [was] trying to obtain custody." Defense counsel objected on grounds Decker's testimony was irrelevant, hearsay and testimonial in nature.

On appeal, Cash argues the court abused its discretion and violated his constitutional rights to fair trial and due process by admitting Decker's testimony. He contends the evidence was inflammatory and prejudicial and there was no evidence Cash directed his wife

to make the call. We conclude there was no abuse of discretion and therefore no violation of Cash's constitutional rights.

The defense made clear in the course of trial, beginning with its cross-examination of Nicole, that it was relying on the theory that Nicole falsely accused Cash of molesting her because of the ongoing custody dispute between Mother and Father. Defense counsel questioned Nicole about it. He asked if Father told her what to say about Cash in the forensic interview. She testified he did not. Defense counsel also questioned Nicole's brother about the custody dispute, and whether he remembered Father being upset when court papers were served on him. He did not.

Decker's testimony was highly probative of Nicole's credibility. Nicole maintained she was telling the truth in the face of Mother's intense pressure and enticements for her to recant. Moreover, the conversation took place where no detective, judge, or jury was watching her. In contrast, the prejudicial effect was minimal. Decker's testimony was brief and to the point. As to the argument the testimony created undue sympathy for Nicole, the court instructed the jury not to let sympathy influence its decision. There is no suggestion that the jurors disregarded that admonition. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [courts presume that jurors understood and followed the jury instructions].)

II. *Jury Instructions*

Cash contends he is entitled to reversal because CALCRIM Nos. 330 and 1190 unconstitutionally lowered the prosecution's burden of proof and artificially boosted Nicole's credibility. Other California courts have rejected similar challenges. We do likewise.

A. CALCRIM No. 330

The court instructed the jury in accordance with CALCRIM No. 330 as follows:

"You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony.

"In evaluating the child's testimony, you must consider all the factors surrounding that testimony, including the child's age and level of cognitive development.

"When you evaluate a child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate.

"While a child and adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

Cash maintains the instruction "invaded the province of the jury, lessened the prosecution's burden of proof, denied [Cash] the jury's assessment of the child witnesses, and violated due process." He contends CALCRIM No. 330 "improperly rehabilitated" Nicole who was "an inherently unreliable witness." Cash acknowledges he did not object to the instruction at trial, but argues he did not forfeit the issue on appeal because the erroneous instruction affected his substantial rights. (§ 1259.)

As Cash acknowledges, several courts of appeal have rejected the same constitutional challenge to CALCRIM No. 330 — in California's unofficial instruction, CALJIC No. 2.20.1. (See *People v. McCoy* (2005) 133 Cal.App.4th 974, 979-980 (*McCoy*); *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457.) *McCoy* summarized the holdings of the three earlier cases:

"Two of those cases arise from the Fourth Appellate District, Division Two. In the first of those cases, *People v. Harlan*[, *supra*,] 222 Cal.App.3d 439 . . . , the court held that the instruction neither excessively inflates a child's testimony nor impermissibly usurps the jury's role as arbiter of witness credibility nor violates the accused's right to confront a child witness nor 'require[s] the jury to draw any particular inferences from a child's cognitive ability, age and performance as a witness. Rather, it instructs the jury to consider such factors in evaluating a child's testimony.' (*Id.* at pp. 455–457.) In the second of those cases, *People v. Jones*[, *supra*,] 10 Cal.App.4th 1566 . . . , the court held that the instruction 'presupposes that the jury must make a determination of credibility, but only after considering all the factors related to a child's testimony, including his [or her] demeanor, i.e., how he or she testifies on the stand,' all without "'foreclos[ing] independent jury consideration of the credibility of a child witness.'" (*Id.* at pp. 1572, 1574.) A case from the Sixth Appellate District held that CALJIC No. 2.20.1 neither "'lessen[s] the government's burden of proof'" nor "'instructs the jury to unduly inflate the testimony of a child witness'" (*People v. Gilbert*[, *supra*,] 5 Cal.App.4th 1372, 1393 . . . : 'The instruction tells the jury not to make its credibility determinations solely on the basis of the child's "age and level of cognitive development," but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom "'traditional assumptions'" may previously have biased the factfinding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result.' (*Ibid.*)" (*McCoy, supra*, 133 Cal.App.4th at p. 979.)

We find the holdings of these four cases persuasive and unaffected by the Supreme Court's decision in *People v. Dennis* (1998) 17 Cal.4th 468, 527 (earlier unsuccessful attacks on CALJIC No. 2.20.1 "not so baseless and unreasonable as to render *defense counsel's performance deficient* for not requesting the instruction" [*italics added*]). Accordingly, we reject Cash's constitutional challenge to CALCRIM No. 330.

B. CALCRIM No. 1190

We reject Cash's challenge to CALCRIM No. 1190 for similar reasons. During the discussion on proposed jury instructions, defense counsel objected to CALCRIM No. 1190 on grounds it was already covered by CALCRIM No. 301, the instruction on a single witness's testimony. The court disagreed the instruction was redundant, stating: "It's part of the CALCRIM set of instructions on sexual assault It states a legal fact and it gives the jury some guidance of what to do with the alleged victim's testimony."

Cash acknowledges that the Supreme Court rejected his constitutional arguments with respect to CALJIC No. 10.60 (see CALCRIM No. 1190) in *People v. Gammage* (1992) 2 Cal.4th 693, 700-702. Although Cash maintains *Gammage* was wrongly decided, he also concedes we are bound by its holding under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Accordingly, we conclude the trial court neither erred nor violated Cash's constitutional rights by instructing the jury with CALCRIM No. 1190.

III. *Sufficiency of the Evidence to Prove Distribution of "Harmful Matter"*

Cash argues there is insufficient evidence to support his conviction in count 6 because (1) the prosecution failed to prove he showed Nicole "harmful matter" within the meaning of sections 288.2, subdivision (a) and 313, subdivision (a); and (2) the prosecution presented no evidence on contemporary community standards regarding obscenity. We conclude the record supports Cash's conviction in count 6.

When a criminal defendant challenges the sufficiency of the evidence, we must review the record in the light most favorable to the judgment to determine whether the record discloses substantial evidence from which a reasonable trier of fact could find the defendant

guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Although we must ensure that the evidence is reasonable, credible and of solid value (*Johnson*, at pp. 576-578), we leave it to the jury to determine the credibility of witnesses and the truth or falsity of the facts upon which that determination depends (*People v. Barnes* (1986) 42 Cal.3d 284, 303). The testimony of a single witness, if believed, is sufficient to prove any fact. (Evid. Code, § 411; *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.)

The jury convicted Cash of violating section 288.2, subdivision (a), which provides:

"Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense"

Section 313, subdivision (a) essentially tracks the United States Supreme Court's three-prong test for obscenity set forth in *Miller v. California* (1973) 413 U.S. 15, 24 (*Miller*), and provides: "'Harmful matter' means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (§ 313, subd. (a); *People v. Dyke* (2009) 172 Cal.App.4th 1377, 1382 (*Dyke*).)

"Under *Miller*, the question of what is '"patently offensive"' under the community standard obscenity test is essentially a question of fact." (*Dyke, supra*, 172 Cal.App.4th at p. 1384, quoting *Miller, supra*, 413 U.S. at p. 30.) Thus, we consider whether a rational trier of fact could have found the "nasty movies" viewed by Nicole to be patently offensive under contemporary statewide standards. (*Dyke*, at p. 1384.) "Under this test, 'the primary concern' is that the communication be 'judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one.'" (*Ibid.*, quoting *Miller*, at p. 33.)

Relying on *Dyke, supra*, 172 Cal.App.4th 1377, Cash argues that Nicole's testimony that he showed her "nasty movies," including pictures of a naked male and female "humping" and touching each other's "inappropriate area[s]," failed to place in context what Nicole saw or provide insufficient detail to prove the material was obscene. In *Dyke*, the 16-year-old victim testified that the defendant showed her television scenes which depicted: (1) a naked woman dancing; and (2) a side view of a naked woman and naked man from the waist up having sex. (*Id.* at pp. 1380-1381.) The court found that viewed out of context, the evidence was insufficient to prove that the television segments shown to the 16-year-old minor violated the community standard and were therefore "harmful matter" for purposes of section 288.2, subdivision (a). (*Id.* at pp. 1380, 1384-1385.) The court explained: "What is missing from this record is any context by which the reasonable trier of fact can make this determination. There is only a bare-bones recital by A.S. of what she saw: a nude woman dancing and a naked couple having sex, shown from the waist up, and her own characterization of it as 'pornography.' Without more, neither we nor the jury are permitted

to presume that such content is patently offensive to the average adult, applying statewide community standards." (*Id.* at p. 1385.)

This case is distinguishable from *Dyke*. In addition to the testimony cited by Cash, Nicole also stated at trial that Cash told her that the girl in one of the "nasty movies" he showed her was 12 or 13 years old and was having sex with her dad. That movie portrayed illegal conduct punishable as felonies: (1) unlawful sexual intercourse in violation of section 261.5; (2) incest in violation of section 285; and (3) a lewd and lascivious act upon a child under 14 years of age in violation of section 288, subdivision (a).

Cash also contends the prosecution offered no evidence concerning the statewide standard for determining the obscene nature of material viewed by Nicole. Given Nicole's description of the movie portraying sexual intercourse between a father and daughter, we need not decide whether expert testimony was necessary. Because the prosecution charged Cash with lewd and lascivious conduct with a minor in violation of section 288, subdivision (a), the court instructed the jury on the elements of that offense. Thus, the jury was aware that the Legislature and community in general considered sexual conduct between minors and adults so harmful and offensive as to be criminally punishable. We therefore conclude the prosecution was not required to offer additional evidence regarding the statewide standard for determining obscenity. Accordingly, we conclude there was sufficient evidence to support Cash's conviction in count 6.

IV. *Cumulative Error*

Having found no error, we reject Cash's claim that reversal is required on grounds of cumulative error.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.